STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WAYNE RUTHERFORD,

Defendant-Appellant.

UNPUBLISHED
July 31, 2007

No. 269690
Oakland Circuit Court
LC No. 2005-204854-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAHMAL ASTAR DILLAHUNTY,

Defendant-Appellant.

No. 269691
Oakland Circuit Court
LC No. 2005-204583-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEY LAMONT HUMPHREY,

Defendant-Appellant.

No. 270450
Oakland Circuit Court
LC No. 2005-204855-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY LYNN HUMPHREY II,

Defendant-Appellant.

No. 270451
Oakland Circuit Court
LC No. 2005-204584-FC

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

All four defendants were convicted of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a and 750.529, jail escape while awaiting a felony trial, MCL 750.197(2), conspiracy to commit jail escape, MCL 750.157a and 750.197(2), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b.

Defendant Rutherford was sentenced to two terms of twenty-five to sixty years in prison on the armed robbery and conspiracy convictions, two terms of two to fifteen years on the escape and conspiracy to escape convictions, and two consecutive two-year terms on the felony-firearm convictions. Defendant Dillahunty was sentenced to twenty-five to sixty years in prison on both the armed robbery and conspiracy to commit armed robbery convictions, three to six years each on the escape and conspiracy to escape convictions, and the two-year mandatory consecutive sentence on the two felony-firearm convictions. Defendant Joey Humphrey was sentenced to 18 years, 9 months to 40 years in prison on the armed robbery and conspiracy to commit armed robbery convictions, two to four years in prison on the escape and conspiracy to escape convictions, and the mandatory consecutive two-year terms on the felony-firearm convictions. Defendant Jeffrey Humphrey was sentenced to 25 to 50 years in prison on the armed robbery and conspiracy to commit armed robbery convictions, three to six years in prison on the escape and conspiracy to escape convictions, and the mandatory consecutive two-year terms on the felony-firearm convictions. All of the defendants now appeal and we affirm.

Defendants' convictions arise from an escape attempt from jail, specifically the lock-up at the 50th District Court. Ronald Gracey, the court security officer, testified that as he was bringing a prisoner back from a courtroom, defendant Dillahunty was in a cell, complaining of stomach pains. After Officer Gracey opened the cell door, he was attacked by defendant Jeffrey Humphrey. Gracey further testified that, during his struggle with Jeffrey Humphrey, someone other than Jeffrey Humphrey removed his firearm from his holster. Gracey described being punched and kicked numerous times and dragged into the jail cell. He also described being threatened with his own weapon by Dillahunty, demanding Gracey's "swipe card." The swipe card was necessary to open the outside security doors. The officer's keys and handcuffs were also taken.

The prosecutor also presented testimony by other inmates in the lock-up that day. Timothy Reid testified that he overheard all four of the defendants discussing an escape plan, including attacking the guard and taking his keys and whatever other items that he might have that would aid in the escape. He also described Jeffrey Humphrey pointing the gun at Gracey. Robert Bennett also testified to overhearing all four defendants planning an escape in great detail, including the idea of overpowering a guard, beating him, and taking his gun and keys. He also describes Jeffrey Humphrey pointing the gun at Gracey's head. Similar testimony was offered by two other inmates.

Defendant Michael Rutherford

Defendant Rutherford first argues that the trial court erred in denying his motion to quash as well as in denying his motion for directed verdict. We decline to consider whether the trial court erred in denying the motion to quash because that issue is now moot inasmuch as defendant has gone to trial. *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003). Therefore, we will focus on the question whether the trial court erred in denying defendant's motion for directed verdict. We review a denial of a motion for directed verdict by looking at the evidence admitted up to the time the motion is made, in the light most favorable to the prosecution, to determine if a rational trier of fact could conclude that each element of the offense was proven beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). Defendant challenges whether there was sufficient evidence to establish the intent to steal element of armed robbery. The robbery was based upon the taking of the guard's keys, handcuffs and firearm. Defendant argues that there was no intent to permanently deprive the guard of these items, but that the items were merely removed from the guard's possession in order to facilitate the escape.

This is certainly a compelling argument, especially with respect to the keys and handcuffs for which defendants would have had little use beyond their value in facilitating the escape.[1] But while this is a compelling argument, it is one for which the jury had to be compelled, not this Court. The jury heard the evidence, including the circumstances surrounding the taking of these items and where they were discovered after the escape. It was for the jury to consider this evidence and reach a conclusion whether defendant possessed the larcenous intent in taking the items (or aided and abetted the taking of the items). While the jury would have been justified from the evidence in concluding that there had been no intent to steal, they were also justified in concluding that there was, in fact, an intent to steal. This is particularly true with respect to the firearm, which was found hidden outside the jail not merely abandoned once it was no longer needed.

Defendant also argues that, even if his codefendants had the intent to steal, he did not and did not aid and abet his codefendants knowing that they intended to steal. But there was evidence that the plan involved taking the keys, handcuffs and gun before the escape attempt even started. Further, one of the codefendants stated upon capture that defendant had the gun.

[1] The firearm, of course, might have had value to defendants beyond the mere need to disarm the guard, and perhaps arm themselves, in connection with the escape.

While the sources of this information may have questionable credibility, it was for the jury, not this Court, to resolve that credibility issue. *Lemmon, supra* at 642.

Defendant also argues that, even if the intent to steal developed after the guard was assaulted, the assault had to be contemporaneous with the intent to steal. But the Legislature amended the robbery statute in 2004 and it is no longer required that the larcenous intent and the use of force or violence occur at the same time. MCL 750.530.

In short, the trial court was justified in submitting the issue to the jury.

Defendant next argues that he was denied effective assistance of counsel when counsel failed to request a delay in the trial so that he would not have to appear in front of the jury with visible injuries from an altercation with sheriff's deputies. We disagree. Trial was set to begin the day after jury selection and defendant was involved in an altercation with deputies when he resisted going to the courthouse that morning without first receiving his medication for back pain. The trial was delayed that day, but resumed the following day. Defendant claims that his attorney should have sought a longer delay so that defendant's injuries were no longer visible.

Defendant, however, fails to establish that he had any visible injuries or the nature and extent of any such injuries. In any event, we fail to see how such injuries would have necessitated a continuance of the trial or prejudiced defendant. That is, while wearing handcuffs, shackles and prison garb may send a visual message of guilt to the jury, we fail to see how bruises and such do so. There is no reason for the jury to know how defendant sustained his injuries and, therefore, it is speculative at best that the jury would conclude that the injuries in some way point to defendant's guilt. In short, defendant has not demonstrated any reasonable likelihood that any such motion to adjourn would have been granted or that the failure to obtain an adjournment in any way affected the outcome of the trial. Therefore, he has not established an essential requirement of a claim of ineffective assistance of counsel. *People v Riley (Aft Rem)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

Defendant's final argument is that the trial court erred in denying his motion for a separate trial. We disagree. The Supreme Court summarized the review of a decision to sever or join trials in *People v Hana*, 447 Mich 325, 346-347; 524 NW2d 628 (1994):

> We therefore hold that, pursuant to MCL 768.5; MSA 28.1028, and MCR 6.121(D), the decision to sever or join defendants lies within the discretion of the trial court. Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.

Defendant has made no such showing, either in the trial court or in this Court, that severance was necessary to protect his substantial rights. Indeed, defendant presents no argument that his defense was completely antagonistic to the defenses of his codefendants and only offers a weak

argument why a separate trial was necessary—that a separate trial would highlight the weakness of the case against him. But that is speculative at best and it is at least as equally arguable that a joint trial assisted defendant's defense by presenting the jury with a very visible set of defendants to cast responsibility on while accepting defendant's argument that he was merely an opportunistic bystander who took advantage of his codefendants' actions to escape himself.

In sum, we are not persuaded that the trial court abused its discretion in denying defendant's motion to sever his trial from that of his codefendants.

Defendant Jahmal Dillahunty

Defendant first argues that there was insufficient evidence to support his convictions for armed robbery and related offenses. We disagree. Defendant's argument consists of attacking the credibility of the various witnesses and pointing out, in general terms, the inconsistencies of their testimony. But, as noted above, credibility is a question to be resolved by the jury. *Lemmon*, *supra*. And there was testimony that all four defendants discussed and planned the escape, including relieving the guard of his possessions. Therefore, a reasonable trier of fact could conclude that the defendant participated in the conspiracy and, at a minimum, aided and abetted the commission of the armed robbery and, by extension, the felony-firearm.

Defendant's other argument is that his sentences of 25 to 60 years in prison on the armed robbery and conspiracy to commit armed robbery convictions were excessive. But those sentences were within the sentencing guidelines' recommendation of a minimum sentence range of 225 to 468 months, or life. Accordingly, we are obligated to affirm defendant's sentence. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

Defendant Joseph Humphrey

This defendant also challenges the sufficiency of the evidence establishing his responsibility for the armed robbery and related charges. But, as with the other defendants, there was evidence linking him to the armed robbery. And, while there may be a basis for challenging the credibility of that evidence, it was for the jury to determine whether the evidence was credible. Viewing the evidence in the light most favorable to the prosecutor, the jury was justified in finding all of the elements established beyond a reasonable doubt.

Defendant also argues that he is entitled to resentencing because Offense Variables 7 and 8 of the sentencing guidelines were misscored. We disagree. First, we decline to review the scoring of OV 8, which was scored at 15 points. Whether OV 8 is scored at zero or fifteen points, the guidelines' recommendation will not change; this is true regardless whether OV 7 is misscored or not as well. Therefore, even if OV 8 was misscored, a remand for resentencing would not be required. *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004), aff'd 473 Mich 399; 702 NW2d 530 (2005). But the scoring of OV 7 at 50 points does potentially affect the guidelines' recommendation. If OV 7 should have been scored at zero points instead of 50 points, the offense variable level will be reduced from VI to V and the recommended minimum sentence range would change from 171 to 285 months down to 135 to 225 months.

Fifty points for OV 7 is appropriate where a "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim

suffered during the offense." We will uphold the trial court's scoring of the guidelines if there is any evidence in the record to support it. *Houston, supra* at 471. Defendant argues the facts do not support a scoring of 50 points for OV 7 because the victim was not treated with excessive brutality. There was evidence that the victim was beaten for a period of five minutes or more, was thrown into a cell with inmates, and was bleeding, disoriented and unable to stand without assistance. He was also threatened with his own gun to give up the "swipe card" to allow defendants to open the outside door. We are satisfied that there was evidence to support the trial court's scoring of OV 7.

Defendant also argues that, even if the facts support a scoring of 50 points for OV 7 because the victim was brutalized, it still should not have been scored at 50 points for him because there was insufficient evidence to support the conclusion that it was he, rather than one or more of the other defendants, who brutalized the guard. We disagree. First, there was evidence to support a conclusion that defendant participated in the beating of the guard. Second, we believe that it is not relevant whether defendant, rather than one of his cohorts in crime, actually committed the beating. The proper construction of the sentencing guidelines presents a question of law to be reviewed de novo. *Houston, supra* at 473. The statute provides that 50 points is appropriate where the victim is treated with excessive brutality. It does not state that, in multiple offender crimes, that only the actual offender who commits the excessive brutality is to be assessed the points. Because the victim was treated with excessive brutality, all defendants who participated in the crime were subject to being assessed 50 points without regard to which one(s) actually participated in the beating.

Accordingly, there is no basis to conclude that the sentencing guidelines were misscored and, therefore, no basis to remand for resentencing.

Defendant Jeffrey Humphrey

Like the other defendants, defendant Jeffrey Humphrey argues that there was insufficient evidence to support the armed robbery conviction and the convictions on the related offenses. Defendant first presents a brief argument that there cannot have been an armed robbery because the armed element was only satisfied by the taking of the firearm from the victim. Without reference to any authority, defendant suggests that this cannot satisfy the armed element of armed robbery. We disagree. MCL 750.529 provides that a person who engages in conduct proscribed under the unarmed robbery statute, MCL 750.530, is guilty of armed robbery if they are armed with a weapon in the course of committing the robbery. Furthermore, MCL 750.530(2) clearly provides that the crime of robbery continues through the flight after the commission of the theft. Therefore, we conclude that, because the course of the robbery includes the flight from the robbery under MCL 750.530(2), if a defendant becomes armed at any time during the "course of committing a larceny" as defined in MCL 750.530(2), the armed element of armed robbery is satisfied.

Furthermore, we note that there was also evidence from which the jury could conclude that defendant was armed before his codefendant, Joseph Humphrey, took the keys from the victim. Accordingly, the jury could conclude that the keys were the subject of a robbery and defendant was armed at the time.

Defendant also argues that there was insufficient evidence to establish that he participated in a conspiracy to commit armed robbery. Specifically, defendant argues that there was insufficient evidence to establish an agreement to rob the victim of the gun, keys and handcuffs rather than merely temporarily dispossess him of those items in order to facilitate the escape. That is, he argues that there was no evidence of an intent to permanently deprive the victim of those items. But as discussed above, there was evidence that all of the defendants participated in planning the escape, which included the taking of the items from the guard. Furthermore, intent can be determined by the jury indirectly from the accused's conduct and the circumstances surrounding the crime. Here, the jury heard the testimony of the other inmates regarding what they overheard the defendants planning, they heard what actions the defendants took, and they heard where the items taken from the guard were recovered, including the fact that the gun was hidden and not merely discarded where it could easily be recovered and returned to its owner. With these facts in mind, and viewing the evidence in the light most favorable to the prosecutor, we believe that a rational trier of fact could conclude that the element of intent to permanently deprive the owner of the property was satisfied.

Next, defendant argues that there was insufficient evidence to establish that he possessed a firearm during the commission of a felony. We disagree. Defendant argues that the only evidence linking him with the gun took place after both the assault and the escape took place. Defendant, however, overlooks the testimony that he came back with the gun to force the victim to give up the swipe card to give defendants access to the outer door. The fact that defendant was not in possession of a firearm at the beginning of the crimes is irrelevant. It is sufficient that he possessed a firearm at any point during the criminal transaction. See *People v Shipley*, 256 Mich App 367, 375-377; 662 NW2d 856 (2003) (the theft of a firearm during the course of a home invasion is sufficient to establish felony-firearm).

Defendant's final argument is that he was denied a fair trial because of an improper civic duty argument by the prosecutor. We disagree. Defendant complains that the following portion of the prosecutor's closing argument was improper:

> I want to thank you for your service and all the diligent attention that you have all paid in this case. And I want to ask you a question. It's a rhetorical question. I want to ask you, as you go about your daily lives going to work, paying your bills, doing your jobs, who here do you think is above the law, who amongst us? Who are the people or who's the person that has the right to brutalize, beat, terrorize, and attack another human being without recourse? Who here doesn't have to play by the rest of the rules that you and I have to follow every day as we live in this society? Who here has the right to take a firearm from a police officer and as that officer lays injured, dazed, and bleeding his very gun in his face?
>
> Does Mr. Dillahanty, the Humphrey bothers, also known as Maki and Joey Ragland, do they get to do this? Because they think that a man that they've shot has died and they're about to be arraigned on murder charges, what do you think, do you think we should let them go? Should they not be held accountable for all of the choices that they've made in their lives just like you and I would be?

> Should they also be held accountable for the actions they took but also the help that they gave to each other?
>
> How about Defendant Rutherford because he escaped the Friday before and now knows and understands exactly what he's facing, how about him, should we let him go? Is he not responsible for the actions that he chose and the help and the encouragement he gave his co-defendants?

Defendant also points to the prosecutor's statement in rebuttal closing argument that the jury instructions are "the laws that would say no, you do not get away with what you've done."

Defendant did not object at trial to this argument. Accordingly, we review this issue for plain error. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Alternatively, defendant argues that counsel's failure to object constituted ineffective assistance of counsel.

While a prosecutor may not argue that the jury should convict a defendant as their civic duty, an argument to hold a defendant accountable for his actions is not regarded as an improper civic duty argument. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). Accordingly, there is no plain error present on this issue nor was counsel ineffective by failing to object to the argument. *Id.* at 58 (counsel not ineffective for failing to make a meritless objection).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Peter D. O'Connell